IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-867

HAROLD C. NORMAN,

Petitioner,

vs.

DONALD J. SMITH and HAROLD R. PATTON,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment herein of the United States Court of Appeals for the Seventh Circuit entered in the above-entitled case on September 6, 1978, affirming a judgment of the United States District Court for the Southern District of Illinois in favor of the Respondents, dismissing Petitioner's Complaint.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is set out in Appendix A, infra, A1-A3, and was unpublished and not cited by Order of the Court pursuant to Circuit Rule 35. The Order and opinion of the United States

District Court for the Southern District of Illinois is set out in Appendix B, infra, B.

JURISDICTION.

The judgment of the United States Court of Appeals below (Appendix A), was entered on September 6, 1978. This Petition for a Writ of Certiorari was filed within ninety (90) days of that date. The jurisdiction of this Court is invoked under 28 U. S. C. § 1254 (1).

QUESTIONS PRESENTED.

1. Whether a Federal Court may properly afford Petitioner relief without derogating the principle of nonjudicial interference in internal military affairs?

STATUTES INVOLVED.

The following provisions are reprinted in pertinent part in Appendix C:

1. 10 U. S. C. § 8851;
2. 42 U. S. C. §1983;
3. 42 U. S. C. § 1985 (3);
4. 42 U. S. C. § 1988;
5. 32 U. S. C. § 709;
6. 32 U. S. C. § 323;
7. Chapter 129, § 220.22, Ill. Rev. Stat. (1975).

STATEMENT OF THE CASE

Petitioner Norman is a citizen of the United States who occupied a permanent accepted Federal Civil Service position with the Illinois Air National Guard with a rank of Colonel who, at the time of his termination, was the Commander of the Air

Base of the 182nd Tactical Air Support Group of the Illinois Air National Guard in Peoria, Illinois.[1]

The Petitioner, age 56, had thirty-three (33) years of commissioned military service and was entitled to remain in the service of the Illinois Air National Guard (hereafter IANG) as a commissioned military officer and air technician until September 17, 1981 by virtue of an authorization and order of the Chief Air Personnel Division, National Guard Bureau, Department of the Army and Air Force, in accordance with 10 U. S. C. 8851(c).

In 1976 Petitioner, like all officers with an excess of 20 years service in the IANG, was considered for further retention by a "Vitalization Board" (hereafter Board) pursuant to an Air National Guard regulation, (hereafter ANG 36-06) which is set out in Appendix D.

There is a conflict as to whether the original 1976 Board was properly composed. Petitioner contends that, in violation of ANG 36-06, no appending Order was attached to his notice authorizing Colonel Ralph A. Bush, who was junior in rank to Petitioner, to be a member. The Respondents contended that Petitioner was notified of the reason of Colonel Bush's inclusion.

It was not controverted that the Chairman of the Board was Respondent Smith, who in 1975 had acted as the complaining witness in termination proceedings brought against Petitioner pursuant to 32 U. S. C. § 709(e)(3) et seq., which culminated in an evidentiary hearing and resulted in a finding of not sustained charges.

It was also not disputed at the District Court level that the scoring key of the original Board proceedings consisted of a maximum of 100 points, of which 50 points were allocated to the Petitioner's last Officer Effectiveness Report (hereafter OER), which was compiled on Petitioner by Respondent Smith;

1. Subsequent to the commencement of the instant litigation and after Petitioner was reinstated he received a medical discharge on the basis of physical findings at his reinstatement physical.

that Petitioner received a total of 48 points when 58 points was the minimum number for recommendation for continued employment and that Petitioner was only given credit for 10 points of a possible 50 points with respect to the OER prepared by Respondent Smith.

It was further undisputed that the special orders appointing the Board of Officers in 1976 by Respondent Patton contained only three names; Generals Smith, Tyree and Colonel Bush, all of whom were required to sit on Petitioner's 1976 Board since the Board was composed of three members, while similar orders appointing Boards in 1974, 1972 and 1970 all contained a minimum of seven eligible officers, including Petitioner.

The original Board's recommendation was that Petitioner not be retained in active duty and that recommendation was accepted by Respondent Patton, then Adjutant General of the Illinois Air National Guard, who informed the Petitioner by letter on September 27, 1976 of his prospective termination status. The action to not retain Petitioner as an officer led to Petitioner's transfer to reserve status as of November 29, 1976, and the Petitioner's consequent loss of his position as technican.[2]

During the course of the proceedings in the District Court a reconstituted Board met on July 12, 1977 and used a somewhat different scoring key (by considering the Petitioner's last five OER's as opposed to just his last prior OER, all of which were compiled by Respondent Smith) and it unanimously held that the Petitioner ranked in the upper one-third of the eight Colonels considered and should be retained on active duty.

The Petitioner's Complaint consisted of a first cause of action seeking conjunctive relief only and the second cause of action, incorporating all factual references made in the first cause of action, for injunctive and monetary relief.

2. ANG technicians are full time Federal civilian employees whose status as members of the National Guard is a statutory prerequisite to their continued employment as technicians. 32 U. S. C. § 709(e)(1).

The Respondent Smith, Major General, was the direct superior officer of the Petitioner and Chief of Staff of the Illinois Air National Guard. The Respondent Patton, Major General ret., is a former Adjutant General of the State of Illinois.

The first cause of action was brought under 42 U. S. C. § 1983 and claimed Respondents convened a "Vitalization Board" to consider Petitioner's retention in the Air National Guard on June 5, 1976 and that "the majority of said Board was not impartial and operated in an arbitrary and capricious manner in order to arbitrarily and unfairly decide that Petitioner would be found unfit for further active duty with the Illinois Air National Guard in that Defendant Smith was personally and professionally biased and prejudiced against the Petitioner .....".

The second cause of action was under 42 U. S. C. § 1985(3) of the Civil Rights Act and claimed that the Respondents conspired to convene an impartial Board and "that in the acts performed pursuant to said conspiracy, the performance of Plaintiff was completely ignored and Plaintiff was never advised that the proceeding was an adversary one at which charges would be levied against him, his notice having read the same as prior years .....".

After filing their answer to the Complaint, Respondents filed their Motion to Dismiss the Complaint on the basis that the District Court lacked jurisdiction over the subject matter and that the Complaint failed to state a claim upon which relief could be granted pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6). The District Court denied the Motion as to the Respondents Smith and Patton.[3]

After the reconstituted Board had met and recommended Petitioner's reinstatement, the Petitioner was in fact reinstated and pursuant to said reinstatment the Respondents filed their

3. The Petitioner confessed the Motion to Dismiss as to another Defendant, Reed. The District had allowed the Motion to Dismiss of Defendant Walker on January 20, 1977 on other grounds.

Motion to Dismiss the Complaint on the basis of mootness. The District Court Judge found that the issues of the Complaint were moot notwithstanding Peitioner's argument of a claim for attorney's fees pursuant to 42 U. S. C. § 1988 and actual money damages and thereafter entered his decision and order on September 16, 1977, from which Petitioner appealed to the Seventh Circuit Court of Appeals.[4]

The Court of Appeals for the Seventh Circuit affirmed the District Court's decision and order but did so on the grounds that the District Court lacked subject matter jurisdiction to entertain a cause of action which, if granted, would affect the internal military affairs of the Illinois Air National Guard and the National Guard Bureau.

It is this Order of the Court of Appeals for the Seventh Circuit that is the object of this Petition for a Writ of Certiorari.

THE DECISION OF THE COURT OF APPEALS.

The Court of Appeals affirmed the decision of the District Court, holding that,

> "There is no established rule governing when judicial review of military decisions is warranted. Rather, whether a particular military determination is subject to judicial review depends on the circumstances of the case. Since a high degree of deference is due to the legislative and executive branches in the area of military affairs, *Gilligan* v. *Morgan, supra,* 413 U. S. at 10, the assumption of jurisdiction to review a military determination is improper if a judicial resolution would interfere to an unwarranted degree with military supervision over primarily military matters."

The Court of Appeals did not comment significantly on the issue of mootness.

4. Although the decision and order of the District Court was entered by the District Court on September 16, 1977 the Order was made by docket entry only and a judgment of decision by the Court was entered by the Clerk of the District Court on January 9, 1978.

REASONS FOR GRANTING THIS WRIT.

I.

The Decision of the Court of Appeals for the Seventh Circuit Is Contrary to the Implicit Holding in Tennessee v. Dunlap.

This Court's decision in *Tennessee* v. *Dunlap,* 426 U. S. 312, (1976) recognized by implication the need for judicial intervention in military affairs in particular circumstances. In that case the Plaintiff was a member of the Air National Guard and a National Guard technician. His term of enlistment was about to expire when his commanding officer notified Plaintiff that he had determined it would not be in the best interest of the Guard to grant Plaintiff's re-enlistment. Thereafter, a Board of Officers or Re-enlistment Board was convened by the Commander to further advise him whether the Plaintiff should be permitted to re-enlist. Plaintiff was denied the right to appear before the Board, which concurred with his commander in recommending the Plaintiff not be permitted to re-enlist. He was discharged from the Tennessee Air National Guard as a reservist of the Air Force and subsequently lost his employment as a technician because of his loss of Guard membership. The Plaintiff alleged that he never received a copy of the information presented to the Board, nor any reason for the decision of the Board, and that the real reason he was denied re-enlistment was to effect his discharge as a civilian technician. The District Court dismissed the Complaint on the ground that denial of re-enlistment was a military action not subject to review by a civilian Court. The Sixth Circuit reversed, holding that the Plaintiff should be given an opportunity to prove that his denial of re-enlistment was not based on military considerations. This Court reversed, agreeing with the trial court.

Although the facts in *Dunlap* differ somewhat from the Petitioner's in that the Plaintiff Dunlap was a non-commissioned

officer who had no "grandfather clause" right to remain and was being considered for re-enlistment while Petitioner Norman, as a commissioned Commanding Officer, had full expectation of continued employment, it appears significant that this Court held against the Plaintiff in *Dunlap* because his due process claim had expired by operation of law and did not address the threshold question of subject matter jurisdiction.

Since it is fundamental that for purposes of a Motion to Dismiss, the material allegations of the Complaint are taken as admitted and the Complaint is to be liberally construed in favor of the Petitioner Norman, *Jenkins* v. *McKeithen,* 395 U. S. 411, (1969), it is submitted that the Petitioner has alleged facts which transcend the constitutional abridgments argued by the Plaintiff in *Dunlap* and that Petitioner Norman has specifically met the Dunlap requisite of a viable due process claim.

II.

The Holding in Tennessee v. Dunlap Has Been Misapplied and Misapprehended by the Lower Courts.

Since this Court issued its ruling in *Tennessee* v. *Dunlap, supra,* the various District Courts who have had occasion to decide on the matter have issued opinions which deviate from each other presumably because the *Dunlap* decision leaves room for further clarification as to the precise criteria necessary for judicial intervention in military affairs.

The vanguard case for such a determination is apparently still *Gilligan* v. *Morgan,* 413 U. S. 1 (1973), wherein Plaintiff sought an Order requiring a review of military decisions relating to the training, weaponry, and operations of the Ohio National Guard. This Court held that the power to provide for such matters was vested in Congress by Article I, Section 8, Clause 16 of the Constitution and legislation pursuant to that power the Congress had empowered the President as Commander in Chief of the Armed Forces to prescribe regulations governing

organization and discipline of the National Guard. In holding that the controversy in that case was non-justiciable, Chief Justice Burger, writing for the Court, stated:

> "It would be difficult to think of a clearer example of the type of government action that was intended by the Constitution to be left to the political branches directly responsible—as the judicial branch is not—to the electoral process. Moreover, it is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of military force are essentially military judgments, subject always to civilian control of the Legislative and the Executive branches. The ultimate responsibility for those decisions is appropriately vested in branches of the government which are periodically subject to electoral countability." 413 U. S. at 10 & 11.

Although the factual circumstances presented in *Gilligan* are so substantially different than Petitioner Norman's as to leave little room for comparison, it would still appear that the *Gilligan* case is the primary authority from which the Courts may judge when to allow judicial intervention in military matters since this Court has not had further occasion to more clearly delineate when such interventions are necessary.

This lack of clear definition as to what circumstances need to be present to allow judicial relief arising out of internal military affairs is made more apparent by a review of those cases considering the question in the lower Courts.

In *Nesmith* v. *Fulton,* 443 F. Supp. 411 (D. C. Ga. 1978), the Plaintiff brought an action under 42 U. S. C. § 1983 after he was denied the right to re-enlist in the Georgia Air National Guard. Although the District Court correctly held that the Plaintiff was not entitled to relief following this Court's holding in *Tennessee* v. *Dunlap, supra,* because his term of re-enlistment had expired and accordingly he had no due process claim to protect, it also held that the basis for its decision in granting

the Defendant's Motion to Dismiss was on the additional ground that the refusal of the Georgia Air National Guard to re-enlist the Plaintiff was a non-reviewable military decision.

In *DiLuigi* v. *Mier*, 430 F. Supp. 1098 (C. D. Pa. 1977) Plaintiff, an electrician hired by the Pennsylvania National Guard sought relief for his termination as a probationary employee at the end of one year period of employment on the basis he had been denied due process rights guaranteed by the Fifth Amendment. The District Court, in denying the Defendant's Motion to Dismiss or in the alternative for Summary Judgment, specifically found that on the basis of this Court's decision in *Dunlap* that the Plaintiff DiLuigi had a continued expectation of employment and that the property interest claimed was protected under the Fifth Amendment to the Constitution.

Thus, the *DiLuigi* and *Nesmith* courts differed on what questions are non-reviewable. It is suggested that further delineation by this Court of the rationale for accepting subject matter jurisdiction in the *Dunlap* case will aid in the elimination of inconsistent holding in the lower courts.

In *Turner* v. *Egan*, 358 F. Supp. (D. C. Alaska 1973) which arose prior to *Dunlap*, a three judge Court denied Petitioner relief relying on the holding in *Mindes* v. *Seaman*, 453 F. 2d 197 (5th Cir. 1971). Although at first glance the Turner decision would appear to have an identical factual pattern as alleged by the Petitioner Norman, it is noted that the primary due process violation alleged by the Turner plaintiffs was a failure to receive proper notice of the Vitalization Board procedings and there was no allegation of direct personal prejudice by a board member such as was alleged by Petitioner Norman.

It is submitted that the inconsistencies in all of the foregoing cases can and should be remedied by a further interpretation of this Court clearly defining what factors should be considered in deciding upon matters otherwise alleging justiciable controversies involving military affairs and operations.

CONCLUSION.

Petitioner respectfully requests that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Argued May 25, 1978
September 6, 1978

Before

HON. ROBERT A. SPENCER, *Circuit Judge*
HON. HARLINGTON WOOD, JR., *Circuit Judge*
HON. WILLIAM J. CAMPBELL, *Senior District Judge**

HAROLD C. NORMAN,
Plaintiff-Appellant,

vs.

No. 78-1185

DONALD J. SMITH, et al.,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of Illinois, Northern Division.

No. P-CIV-76-121

Robert D. Morgan,
Judge.

ORDER.

Prior to the time of bringing this action, plaintiff-appellant Harold C. Norman was a 55 year old Colonel in the service of

* Senior District Judge William J. Campbell of the Northern District of Illinois is sitting by designation.

the Illinois Air National Guard with 33 years of commissioned military service. He had been the Commanding Officer of the 182nd Tactical Air Support Group. Pursuant to 42 U. S. C. §§ 1983 and 1985(3), Norman filed a complaint against the Chief of Staff of the Illinois Air National Guard and the former Adjutant General of Illinois.[1] The Section 1983 claim asserted that a Vitalization Board, which was convened on June 5, 1976 under A N G 36-06 to consider plaintiff for retention in the Illinois Air National Guard, was not impartially constituted and operated in an arbitrary and capricious manner to unfairly decide that plaintiff would be found unfit for further active duty. The complaint specified that, due to a prior incident in which plaintiff called attention to defendant Smith's possible illegal and improper conduct, Smith was personally and professionally biased and prejudiced against plaintiff.[2]

The Section 1985(3) claim alleged essentially the same facts in the nature of a conspiracy. The complaint sought equitable relief and money damages.

After the complaint had been filed, plaintiff successfully appealed the Officer Efficiency Ratings which were used by the June 5, 1976 Vitalization Board. Thereafter, a new Vitalization Board was convened on July 12, 1977 to consider plaintiff for selective retention. The new Board recommended that plaintiff be retained. This recommendation was accepted by the Acting Adjutant General, and plaintiff was retroactively reinstated to active duty on December 18, 1977.

1. Also named as defendants were the Governor of Illinois and the Secretary of the Air Force. No appeal was taken from the dismissal of these two defendants.

2. The complaint further specified that a majority of the Vitalization Board was not impartial in that Board Member Bush, who was junior in rank to plaintiff, owed his complete allegiance and continued active duty status to defendant Smith, and accordingly acted at the campricious whim and desire of Smith. Bush was not named as a defendant.

In view of the fact that plaintiff had been reinstated, the district court ordered the case dismissed as moot. We affirm the dismissal, but on grounds other than mootness.[3]

As expressed by Justice Jackson's sentiment that "judges are not given the task of running the Army," *Orloff* v. *Willoughby*, 345 U. S. 83, 93 (1953), there is a traditional hesitancy on the part of the judiciary to assume jurisdiction in a case of this sort and thereby to interfere in military matters. E.g., *Tennessee* v. *Dunlap*, 426 U. S. 312 (1976); *Gilligan* v. *Morgan*, 413 U. S. 1 (1972); *Mindes* v. *Seaman*, 453 F. 2d 197 (5th Cir. 1971); *Nesmith* v. *Fulton*, 443 F. Supp. 411 (M. D. Ga. 1978); *Turner* v. *Egan*, 358 F. Supp. 560 (D. Alaska 1973) (Three Judges Court). There is no established rule governing when judicial review of military decisions is warranted. Rather, whether a particular military determination is subject to judicial review depends on the circumstances of the case. Since a high degree of deference is due to the legislative and executive branches in the area of military affairs, *Gilligan* v. *Morgan*, *supra*, 413 U. S. at 10, the assumption of jurisdiction to review a military determination is improper if a judicial resolution would interfere to an unwarranted degree with military supervision over primarily military matters.

The complaint in this case sought equitable relief and money damages as a result of a military determination to separate plaintiff—a decision which was ultimately overturned through appropriate military procedures. The staffing and retention of senior officers in command positions are clearly internal military

3. To the extent that the complaint is brought under 42 U. S. C. § 1983, we have grave reservations that the complaint adequately alleges that the defendants were acting "under color of any statute, ordinance, regulation, custom, or usage, of any State." The acts complained of were accomplished under regulation A N G 36-06, a federal regulation. We have similar reservations with respect to the conspiracy claim under § 1985(3), since the Section by its terms is limited to conspiratorial deprivations of equal protection rights. The complaint is framed in terms of due process violations. Since we affirm the dismissal on jurisdictional grounds, we need not address these considerations.

judgments within the realm of the expertise and discretion of the military. Judicial review of the military determination involved in this case on the basis of an allegation that the members of the Vitalization Board were personally biased against plaintiff would seriously impede the military's ability to perform its vital function. See *Turner* v. *Egan, supra,* 358 F. Supp. at 564.

Under the circumstances of this case, we find that the district court lacked jurisdiction to entertain the allegations of the complaint. Accordingly, the district court's order dismissing the action is affirmed.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
for the Southern District of Illinois,
Northern Division

HAROLD C. NORMAN,

vs.

DONALD J. SMITH and
HAROLD R. PATTON

Civil Action File No.
P-Civ-76-121

JUDGMENT

This action came on for hearing before the Court, Honorable Robert D. Morgan, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered,

It is Ordered and Adjudged Defendant's Motion to Dismiss is allowed and the case is dismissed as moot.

Dated at Peoria, Illinois, this 9th day of January, 1978.

/s/ ROBERT J. KAUFFMAN
Clerk of Court

APPENDIX C

10 U. S. C. § 8851

§ 8851. Thirty years or five years in grades: reserve colonels and brigadier generals

(a) After June 30, 1960, except for the adjutant general or assistant adjutant general of a State of Territory, Puerto Rico, the Canal Zone, or the District of Columbia each officer in an active status in the reserve grade of lieutenant colonel whose name is on a recommended list for promotion to the reserve grade of colonel, each officer in an active status in the reserve grade of colonel whose name is not on a recommended list for promotion to the reserve grade of brigadier general, and each officer in an active status in the reserve grade of brigadier general whose name is not on a recommended list for promotion to the reserve grade of major general, shall, 30 days after he completed 30 years of service computed under section 8853 of this title or on the fifth anniversary of the date of his appointment in the grade in which he is serving whichever is later—

(1) be transferred to the Retired Reserve, if he is qualified and applies therefor; or

(2) if he is not qualified or does not apply therefor, be discharged from his reserve appointment.

(b) Notwithstanding subsection (a), an officer in the reserve grade of brigadier general who would otherwise be removed from an active status under this section may, in the discretion of the Secretary of the Air Force, be retained in an active status, but not later than the date on which he becomes 60 years of age. Not more than 10 officers may be retained under this subsection at any one time.

(c) Notwithstanding subsections (a) and (b) of this section, the Secretary of the Air Force may authorize the retention in an active status until age 60 of any officer of the Air National Guard of the United States who would otherwise be removed from an active status under this

section and who is employed as a technician under section 709 of title 32, United States Code, in a position for which Air National Guard membership is prescribed by the Secretary.

42 U. S. C. § 1983

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U. S. C. § 1985(4)

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President, or Vice President, or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the

recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

42 U. S. C. § 1988

§ 1988. Proceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of a provision of the United States Internal Revenue Code, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

32 U. S. C. § 709

§ 709. Technicians: employment, use, status

(a) Under regulations prescribed by the Secretary of the Army or the Secretary of the Air Force, as the case may be, and subject to subsection (b) of this section persons may be employed as technicians in—

(1) the administration and training of the National Guard; and

(2) the maintenance and repair of supplies issued to the National Guard or the armed forces.

(b) Except as prescribed by the Secretary concerned, a technician employed under subsection (a) shall, while so employed, be a member of the National Guard and hold the military grade specified by the Secretary concerned for that position.

(c) The Secretary concerned shall designate the adjutants general referred to in section 314 of this title, to employ and administer the technicians authorized by this section.

(d) A technician employed under subsection (a) is an employee of the Deparment of the Army or the Department of the Air Force, as the case may be, and an employee of the United States. However, a position authorized by this section is outside the competitive service if the technician employed therein is required under subsection (b) to be a member of the National Guard.

(e) Notwithstanding any other provision of law and under regulations prescribed by the Secretary concerned—

(1) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who is separated from the National Guard or ceases to hold the military grade specified for his position by the Secretary concerned shall be promptly separated from his technician employment by the adjutant general of the jurisdiction concerned;

(2) a technician who is employed in a position in which National Guard membership is required as a condition of employment and who fails to meet the military security standards established by the Secretary concerned for a member of a reserve component of the armed force under his jurisdiction may be separated from his employment as a technician and concurrently discharged from the National Guard by the adjutant general of the jurisdiction concerned;

(3) a technician may, at any time, be separated from his technician employment for cause by the adjutant general of the jurisdiction concerned;

(4) a reduction in force, removal, or an adverse action involving discharge from technician employment, suspension, furlough without pay, or reduction in rank or compensation shall be accomplished by the adjutant general of the jurisdiction concerned;

(5) a right of appeal which may exist with respect to clause (1), (2), (3), or (4) shall not extend beyond the adjutant general of the jurisdiction concerned; and

(6) a technician shall be notified in writing of the termination of his employment as a technician and such notification shall be given at least thirty days prior to the termination date of such employment.

(f) Sections 2108, 3502, 7511, and 7512 of title 5, United States Code, do not apply to any person employed under this section.

(g) (1) Notwithstanding section 5544(a) and 6102 of title 5, United States Code, or any other provision of law, the Secretary concerned may, in the case of technicians assigned to perform operational duties at air defense sites—

(A) prescribe the hours of duties;

(B) fix the rates of basic compensation; and

(C) fix the rates of additional composition;

to reflect unusual tours of duty, irregular additional duty, and work on days that are ordinarily nonworkdays. Additional compensation under this subsection may be fixed on an annual basis and is determined as an appropriate percentage, not in excess of 12 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 of the General Schedule under section 5332 of title 5, United States Code.

(2) Notwithstanding sections 5544(a) and 6102 of title 5, United States Code, or any other provision of law, the Secretary concerned may, for technicians other than those described in clause (1) of this subsection, prescribe the hours of duty for technicians. Notwithstanding sections 5542 and 5543 of title 5, United States Code, or any other provision of law, such technicians shall be granted an amount of compensatory time off from their scheduled tour of duty equal to the amount of any time spent by them in irregular or overtime work, and shall not be entitled to compensation for such work.

(h) In no event shall the number of technicians employed under this section at any one time exceed 53,100, except that the number of technicians so employed may not exceed 49,200 during the fiscal year beginning July 1, 1971.

32 U. S. C. § 323

§ 323. Withdrawal of Federal recognition

(a) Whenever a member of the National Guard ceases to have the qualifications prescribed under section 301 of this title or ceases to be a member of a federally recognized unit or organization of the National Guard, his Federal recognition shall be withdrawn.

(b) Under regulations to be prescribed by the President, the capacity and general fitness of an officer of the National Guard for continued Federal recognition may be investigated at any time by an efficiency board composed of commissioned officers of—

(1) the Regular Army or the Army National Guard of the United States, or both, who outrank him and who are detailed by the Secretary of the Army, if he is a member of the Army National Guard; or

(2) the Regular Air Force or the Air National Guard of the United States, or both, who outrank him and who are detailed by the Secretary of the Air Force, if he is a member of the Air National Guard.

If the findings of the board are unfavorable to the officer and are approved by the President, his Federal recognition shall be withdrawn.

(c) If a member of the Army National Guard of the United States or the Air National Guard of the United States is transferred to the Army Reserve or the Air Force Reserve, as the case may be, under section 3259, 3352(a), 8259, or 8352(a) of title 10, his Federal recognition is withdrawn.

(d) Except as provided in sections 1005 and 1006 of title 10, the Federal recognition of a second lieutenant of the Army National Guard who is discharged under section

3820(c) of title 10 for failure of promotion shall be withdrawn on the date of that discharge.

(e) Except as provided in sections 1005 and 1006 of title 10, the Federal recognition af a reserve officer of the Air Force who is not recommended for promotion under section 8368(c)(1) or (2) of title 10, or who is found to be not qualified for Federal recognition under section 8368(d) or (3) of title 10, shall be withdrawn.

Ch. 129, § 220.22 (Ill. Rev. Stat. 1975)

§ 220.22 General duties of Adjutant General

The Adjutant General shall be charged with carrying out the policies of the Commander-in-Chief and shall issue orders in his name. Orders of The Adjutant General shall be considered as emanating from the Commander-in-Chief.

(a) He shall be the immediate adviser of the Commander-in-Chief on all matters relating to the militia and shall be charged with the planning, development and execution of the program of the military and naval forces of the State. He shall be responsible for the preparation and execution of plans, for organizing, supplying, equipping and mobilizing the Organized Militia, for use in the national defense, and for State defense, and emergencies.

(b) He shall hold major organization commanders responsible for the training of their commands, and shall issue all orders and instructions for the government of the militia and of the officers, warrant officers, and enlisted personnel therein.

(c) He shall make such returns and reports as may be prescribed by the Commander-in-Chief or required by the laws or regulations of the State or of the United States.

(d) The Adjutant General shall be the head of the Military and Naval Department of the Executive Branch of the government of the State.

APPENDIX D.

1. Terms Expained:

a. Officer. For the purpose of this regulation consists of officers and warrant officers including technicians serving in the Air National Guard, excluding tenure officers.

b. Qualifying Service Creditable for Retired Pay. Combined total of commissioned, warrant, and airman service including serivce with other DOD components.

2. Policy. A continuous program of vitalization of the Air National Guard is essential to avoid loss of combat readiness in a maturing force. Lack of promotion possibility and stagnation in the senior grades preclude providing for progression of qualified junior officers into positions of greater responsibility at the proper phasepoints of their careers. To accomplish this program of junior officer development, all ANG officers and warrant officers with over 20 years of qualifying service for retirement will be reviewed for consideration of retention or separation. This program will be achieved by controlled attrition and selective retention of officers qualified for retirement under chapter 67, 10 U. S. C.

a. A board of officers will be convened annually by the State Adjutant General for the purpose of making recommendations for the retention of highly qualified officers for continuation of the combat capability of the Air National Guard.

b. Boards will be convened in sufficient time to provide for submission of board action to the Chief, National Guard Bureau, Attn: NGB/DPM, on or before:

Generals, Colonels and CWO's—30 September
Lieutenant Colonels and below—31 October

3. Criteria. Officers being considered for retention will meet the following criteria:

a. Must have accrued 20 or more years of service required to qualify for retired pay at age 60 before the convening of the selection board. Officers previously selected for retention under any authority will be included and again considered.

b. Must have been verified as being eligible for retired pay at age 60.

c. Are physically qualified for worldwide assignment.

NOTE: Prior to consideration by a board convened under this regulation, an affected officer whose last physical examination dates back more than 1 year and required waiver of any factor will be given a new physical examination. Waiver previously granted which dates back more than 1 year is not valid for this purpose. In the event the waiver is revalidated by the National Guard Bureau, officer will then be considered by the board.

4. Procedures:

a. The Chief, National Guard Bureau will furnish the Adjutant General listing of all officers certified as having over 20 years of service qualifying for retired pay entitlement. This listing will be furnished by the end of the calendar year.

b. The Adjutant General will satisfy himself that the officers listed meet the criteria specified above and will cause an informative letter on "Controlled Attrition and Selective Retention in the Air National Guard" to be sent to each officer concerned informing him of the Selective Retention Program. (Attachment 1.)

5. Appointment of Advisory Boards. The board members will be appointed by the Adjutant General of the State by composed order, enclosed in an envelope, marked for "Eyes Only"

and addressed directly to the individuals appointed. (Attachment 2.)

6. Composition of Advisory Boards. The board will be composed of not less than 3 commissioned officers with voting authority.

a. Since the board is an advisory status of the Adjutant General and has no final determining power, the membership should be comprised of officers in positions possessing wide management and technical experience. Board members should be senior to those being considered. If the Adjutant General finds that it is not reasonably possible to obtain a sufficient number of officers senior those being considered, he may waive this requirement but must append to the appointing order a statement explaining why a sufficient number of such officers could not be obtained.

b. When an officer in one of the following professions is being considered by an Advisory Board for retention, an officer of the same specialty will serve in an advisory capacity to the board: judge advocate, medical officer, dentist, chaplain, veterinarian, medical service corps officer, biomedical services corps officer or nurse. A medical officer (MD) may be substituted for a dental officer, veterinarian, medical services officer, or nurse of one of the same corps is not available or it is impracticable to obtain one to serve as a member of the board.

7. Organization of Advisory Boards. The senior line of the Air Force member will be appointed president of the board and the junior line of the Air Force member will be designated recorder. An additional officer, without vote, may be appointed to the board to act as recorder.

8. Communications for Advisory Boards:

a. The individual being considered for selective retention will be notified of pending action.

b. An individual being considered for selective retention may write a letter to the advisory board inviting attention to any matter of record concerning himself that he feels important in the review of his record.

c. Letters of commendation or appreciation will be forwarded through channels to the State Adjutant General for referral to the advisory board prior to the convening date of the board.

d. Unit Commander impact statement identified in paragraph 10 will be submitted to the Board President before the convening of the board.

e. Unsolicited communications that contain criticism or reflect upon the character, conduct, or motives of any officer will not be given to the advisory board.

9. Personnel Data for Advisory Boards. Prior to convening the board, personnel files of each officer being considered will be screened to ensure the following information is included:

a. Twenty years service verified for retirement.

b. Date last physical completed.

c. Currently under physical waiver. (If applicable.)

NOTE: List of officers to be considered by the board will be matched against the listing furnished by the National Guard Bureau 90 days prior to dates stated in paragraph 2, or the anticipated date of the broad, whichever is earlier.

10. Procedures for Conducting Advisory Boards. The board will assemble at the time and place designated by the president and proceed as follows:

a. The recorder will read the order appointing the board.

b. The recorder will administer the following oath to the other members:

"You (identify each member by grade and name) do swear (or affirm) that you will faithfully without

prejudice or partiality, and having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

c. The President will administer the following oath to the Recorder:

"You (identify by grade and name) do swear (or affirm) that you will faithfully, without prejudice or partiality, having in view both the special fitness of individuals and the efficiency of the Air National Guard, perform duties imposed upon you as a member and recorder of this board and further that you will not divulge the proceedings or results of this board except to proper authority. So help you God."

d. The board will review all documents and make an evaluation of the future benefits that can be expected to accrue to the Air National Guard from the continued service of each officer it considers. When the capability of a military unit will be adversely affected by the loss of the officer being considered, a recommendation from the unit commander stating impact and requesting retention for a specified period of additional years of service should be made. In arriving at an evaluation, the board should consider, but not be limited to the following:

(1) Demonstrated performance as refleted by officer's effectiveness reports, training reports and letters of commendation.

(2) The availability of the individual for military activities in light of the demands of his civilian occupation.

(3) Past record of interest in and dedication to the Air National Guard.

(4) Status with regard to Air Technician retirement eligibility. (Public Law 115, 84th Congress, 30 June 1955).

(5) Rated capability and potential as a crew member in future years (rated only).

(6) Availability of replacement officer with less service who may be lost due to mandatory promotion if high grade vacancies do not exist.

(7) The ratio of officers in an age or service bracket as relates to maintaining an age/grade/service, balanced force.

(8) Growth potential for replacing present leaders.

(9) Latest report of medical condition and physical fitness indicating no significant limitation to preclude performance of duty in an active status.

(10) Other factors bearing on a plan for assuring a viable combat ready military unit in future years.

e. In their deliberation, the board should stress their responsibility to recommend the retention of officers vital to the continuation of the Air National Guard, who would otherwise be lost to retirement or transfer to Air Force Reserve status. It should also consider the use of a numerical rating system in establishing a priority for retention of selected officers. The point weight assigned to the items listed above is left to the discretion of the board members.

11. Actions on Advisory Board Reports:

a. Board:

(1) Upon conclusion of the board's action, a report will be completed and submitted to the State Adjutant General for approval. (Attachment 5.)

(2) A member of the board who disagrees with the recommendations of the majority of the board may submit a minority report. This report must be in

sufficient detail to support the reasons for disagreement. The member will sign both the minority report and the board proceedings, indicating on the board proceedings that the minority report is being submitted as an attachment.

b. State Adjutant General:

(1) The State Adjutant General will review the recommendations of the Advisory Board, including minority reports, and may approve or disapprove any specific recommendations for retention or may make additional selections for retention.

(2) Upon the conclusion of his review the Adjutant General will make a report to the Chief, National Guard Bureau, to the effect that the Selective Retention considerations for the personnel of his State have been completed and that he approves retention or nonretention of the listed officers and warrant officers. (Attachments 7 and 8.)

(3) The Adjutant General will notify each officer concerned of the determination made as to his retention or separation.

c. Chief, National Guard Bureau:

(1) The Chief, National Guard Bureau, will publish orders withdrawing Federal recognition of all officers not recommended for retention. The Adjutant General will be provided copies of the order withdrawing Federal recognition and will take necessary action to discharge the officer from the State and transfer him to grade to the Air Force Reserve in accordance with ANGR 36-05.

(2) Withdrawal of Federal recognition will be effective 60 days following the dates indicated in paragraph 2 for the respective grades. This in no way

precludes initiation of other action to voluntarily or involuntarily discharge the officer concerned as specified in ANGRs 36-05 and 36-014 before the effective date of discharge under this regulation.

No. 78-867

In the Supreme Court of the United States

OCTOBER TERM, 1978

HAROLD C. NORMAN, PETITIONER

v.

DONALD J. SMITH and HAROLD R. PATTON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

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1. Petitioner, formerly a colonel in the Illinois Air National Guard, filed this suit to challenge his involuntary retirement from active military status in 1976 on the recommendation of a Vitalization Board convened under Air National Guard Regulation 36-06 (Pet. App. D1-D8).[1]

[1] Petitioner also was employed as a civilian technician with the Illinois National Guard. This federal job is open only to persons on active military status in the Guard. 32 U.S.C. 709. On dismissal from active military duty, a guardsman's employment as a technician terminates. Part of the relief sought by petitioner was reinstatement in his civilian position on reactivation of his military status (Pet. 4).

Members of the National Guard ordinarily must retire after 30 years of service, which in petitioner's case was reached in 1973. But an order issued by the National Guard Bureau authorized the Illinois National Guard to retain in active status certain officers who had been continuously employed since before 1955 as commissioned officers and civilian air technicians (Exh. A to Complaint). The Illinois National Guard, in turn, authorized petitioners' retention, so long as he remained otherwise qualified, until September 17, 1981, when he would reach age 60 (*ibid.*). Petitioner, like all other officers with more than 20 years of qualifying service, was nonetheless subject to annual reviews by Vitalization Boards convened to recommend which officers should be retained in light of the Air National Guard's objective of avoiding "loss of combat readiness in a maturing force" (Air National Guard Regulation 36-06, Section 2 (Pet. App. D1)).

Petitioner, alleging a conspiracy to terminate his service, brought this action against Donald J. Smith, Chief of Staff of the Illinois Air National Guard, Harold R. Patton, former Adjutant General of the State of Illinois, and others no longer in the case (Pet. App. A2). He charged that the composition of the Vitalization Board was technically improper[2] and that its members were biased. He sought injunctive relief, damages, and costs, including attorney's fees.

[2] The parties disagree on the factual question whether the Adjutant General, as required by Air National Guard Regulation 36-05, Section 6 (Pet. App. D3), appended to the order empaneling the Board a notice justifying the placement on the Board of an officer junior in rank to petitioner.

While the suit was pending, petitioner was reinstated with full backpay, after successful administrative appeals. After receiving notice of the reinstatement, the district court dismissed petitioner's claim as moot (Pet. App. B1).[3]

The court of appeals, without considering the question of mootness, affirmed the dismissal on the ground that judicial review of the actions taken to effect petitioner's retirement would constitute unwarranted interference with military matters (Pet. App. A1-A4).

2. The decision of the court of appeals is correct. In the circumstances of this case, the issues raised by petitioner are nonjusticiable. In a nearly identical case, *Turner* v. *Egan*, 358 F.Supp. 560 (D. Alaska), aff'd, 414 U.S. 1105 (1973), two Air National Guard officers challenged their involuntary retirement on due process grounds.[4] For the purpose of determining whether judicial review was appropriate, the three-judge district court in that case adopted the balancing test employed in *Mindes* v. *Seaman*, 453 F.2d 197 (5th Cir. 1971). Under that test the strength of the plaintiff's claim and the potential injury to the plaintiff if review is refused are weighed against "the type and degree" of interference with a military function

[3] Following that reinstatement, petitioner was discharged on medical grounds (Pet. 3 n.1).

[4] In *Turner* the plaintiffs complained of the absence of procedural due process, including insufficient notice of the convening of the Vitalization Board, ineffective administrative appeal rights, and violations of applicable statutes and regulations. 358 F.Supp. at 562.

anticipated as a consequence of judicial review and "the extent to which the exercise of military expertise or discretion is involved." *Turner* v. *Egan*, *supra*, 358 F. Supp. at 563.

In *Turner* the court found that the plaintiffs' procedural due process contentions and the slight injury occasioned by their retirement under honorable conditions with full military benefits did not outweigh the danger that judicial intrusion might cause to the military's efficient operation of its program for seeing that its officers are those most qualified to serve—a program "centered upon the need to avoid the loss of combat readiness" and one "properly left to the experience and discretion of the military, those professionally trained for that purpose." *Id.* at 563-564. Accordingly, the court dismissed the complaint. This Court summarily affirmed that decision, and the court of appeals properly followed the *Turner* rationale here (Pet. App. A3-A4). See *Hicks* v. *Miranda*, 422 U.S. 332, 344 (1975).

Petitioner, like the *Turner* plaintiffs, raises procedural due process issues related to a decision not to retain him as an Air National Guard officer. He has even less than the *Turner* plaintiffs to show in the way of potential injury if review is denied. Because the Vitalization Board's decision not to retain him was administratively reversed, and he was reinstated with backpay, the only injury resulting from denial of review is his inability to seek recovery of damages from the individual defendants. The benefit to petitioner of judicial resolution of his contentions is

thus outweighed by the damage such resolution might do to efficient conduct of military functions. As the court of appeals stated, the "staffing and retention of senior officers in command positions are clearly internal military judgments within the realm of the expertise and discretion of the military" (Pet. App. A3-A4). It properly concluded that granting judicial review of petitioner's claims "would seriously impede the military's ability to perform its vital function," and that dismissal of the complaint was, accordingly, the proper course (Pet. App. A4). See *Gilligan* v. *Morgan*, 413 U.S. 1 (1973).

Petitioner's reliance on *Tennessee* v. *Dunlap*, 426 U.S. 312 (1976), is unwarranted. This Court rejected the due process claim of the National Guard technician in that case, and, although it did so on grounds other than the grounds for dismissing the claim in *Turner*, it said nothing to suggest it was repudiating its decision in *Turner*.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1979

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